



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 21, 2010

Mr. B. Chase Griffith
Brown & Hofmeister, L.L.P.
For City of McKinney
740 East Campbell Road, Suite 800
Richardson, Texas 75081

OR2010-19252

Dear Mr. Griffith:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 403433 (ORR# 10-2894).

The McKinney Police Department (the "department"), which you represent, received a request for the complete employment/service records regarding two named department officers. You state the department has provided some of the requested information to the requestor. You also state the department will withhold certain information under section 552.117(a)(2) of the Government Code pursuant to the previous determination issued in Open Records Decision No. 670 (2001), and social security numbers under section 552.147 of the Government Code.¹ You claim portions of the submitted employment records are excepted from disclosure under sections 552.101, 552.130, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

¹We note the previous determination issued in ORD 670 authorizes all governmental bodies to withhold the home addresses and telephone numbers, personal cellular telephone and pager numbers, social security numbers, and family member information of peace officers under section 552.117(a)(2) of the Government Code, without the necessity of requesting an attorney general decision. Furthermore, section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

Initially, we note some of the submitted records do not pertain to either of the officers specified in the request. Thus, these records, which we have marked, are not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information that other statutes make confidential, such as the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides, in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Although you generally assert some of the submitted information is protected under the MPA, none of the submitted information constitutes medical records or information obtained from medical records for purposes of the MPA. Therefore, none of the submitted information may be withheld on the basis of the MPA.

Section 552.101 also encompasses laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 at 7 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI the Department of

Public Safety ("DPS") maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code.² See Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. See generally *id.* §§ 411.090-.127. Similarly, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. You claim the submitted information contains confidential CHRI. We have marked the information that constitutes CHRI that is confidential under chapter 411. Accordingly, the marked information must be withheld under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code.

Section 552.101 also encompasses section 411.192 of the Government Code. Section 411.192 governs the release of all information maintained by DPS concerning the licensure of individuals to carry concealed handguns, and provides:

(a) [DPS] shall disclose to a criminal justice agency information contained in its files and records regarding whether a named individual or any individual named in a specified list is licensed under this subchapter. Information on an individual subject to disclosure under this section includes the individual's name, date of birth, gender, race, zip code, telephone number, e-mail address, and Internet website address. Except as otherwise provided by this section and by Section 411.193, all other records maintained under this subchapter are confidential and are not subject to mandatory disclosure under the open records law, Chapter 552.

(b) An applicant or license holder may be furnished a copy of disclosable records regarding the applicant or license holder on request and the payment of a reasonable fee.

Id. § 411.192(a), (b). We have marked a portion of the remaining information regarding a concealed handgun license that appears to have been received by the department from DPS. In this instance, the requestor is not a criminal justice agency, nor is the requestor the license

²Although you assert release of any CHRI in the submitted information is prohibited by section 411.085 of the Government Code, that provision merely provides the penalties for the "Unauthorized Obtaining, Use, or Disclosure of Criminal History Record Information." Gov't Code § 411.085. Section 411.083 is applicable to the dissemination of CHRI and is the proper provision for the substance of your argument.

holder whose information is at issue. Further, we note that section 411.193 is not applicable in this instance. *See id.* § 411.193 (making a statistical report including the number of licenses issued, denied, revoked, or suspended by the department during the preceding month available to the public). Therefore, the department must withhold the information we have marked pursuant to section 552.101 in conjunction with section 411.192 of the Government Code.

The remaining information contains fingerprints. Section 552.101 also encompasses section 560.003 of the Government Code, which provides “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” Gov’t Code § 560.003; *see id.* § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). There is no indication the requestor has a right of access to the fingerprints under section 560.002. *See id.* § 560.002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual’s biometric identifier to another person unless the individual consents to disclosure). Therefore, the department must withhold the fingerprints we have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

The remaining information contains psychological evaluations. Section 552.101 also encompasses section 611.002(a) of the Health and Safety Code, which pertains to mental health records and provides “[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.” Health & Safety Code § 611.002(a). Sections 611.004 and 611.0045 provide for access to mental health records by only certain individuals. *See Open Records Decision No. 565 (1990)*. These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient’s behalf, or a person who has the written consent of the patient. Health & Safety Code §§ 611.004, .0045. We find the psychological evaluations we have marked are confidential under section 611.002 of the Health and Safety Code. There is no indication the requestor is authorized to obtain the information at issue in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. Therefore, the marked psychological evaluations must be withheld under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.

Section 552.101 also encompasses section 1701.306 of the Occupations Code, which provides in relevant part:

- (a) The [Texas Commission on Law Enforcement Officer Standards and Education] may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. A declaration is not public information.

Occ. Code § 1701.306(a)-(b). The remaining information contains L-2 (Declaration of Medical Condition) and L-3 (Declaration of Psychological and Emotional Health) forms. We find these forms, which we have marked, are confidential under section 1701.306 of the Occupations Code, and must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses section 1703.306 of the Occupations Code, which provides:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee;

(2) the person that requested the examination;

(3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;

(4) another polygraph examiner in private consultation; or

(5) any other person required by due process of law.

(b) The [Polygraph Examiners] Board or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Id. § 1703.306. We have marked information that was acquired from polygraph examinations and is, therefore, within the scope of section 1703.306. It does not appear the requestor falls into any of the categories of individuals who are authorized to receive the polygraph information under section 1703.306(a). Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

You assert some of the remaining information is protected by common-law privacy. Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex.1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision No. 545 (1990). We have marked credit and financial history information that is not of legitimate public concern. The department must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.

We note the remaining information includes information that is excepted from disclosure under section 552.102(a) of the Government Code.³ Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex. & The Dallas Morning News, Ltd.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010) (Dec. 20, 2010, motions for reconsideration and rehearing pending). We have marked the information that must be withheld under section 552.102(a) of the Government Code.

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions.

We note section 552.1175 of the Government Code may be applicable to a portion of the remaining information. Section 552.1175 provides in relevant part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]

...

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a), (b). The remaining information contains the home address and cellular telephone number of a police officer not employed by the department. Section 552.1175 encompasses a peace officer's personal cellular telephone number only if the cellular telephone service is paid for by the officer with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001). You do not inform this office, nor does the submitted information indicate, whether the officer at issue has elected to keep this information confidential in accordance with section 552.1175(b). Accordingly, if the officer elects to restrict access to this information, the department must withhold the home address and cellular telephone number we have marked under section 552.1175. However, the department may only withhold the marked cellular telephone number if the officer at issue paid for the cellular telephone service with personal funds. If no election is made, the department may not withhold the marked information under section 552.1175 of the Government Code, and it must be released to the requestor.

You claim some of the remaining information is excepted under section 552.130 of the Government Code, which provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). The remaining information contains Texas motor vehicle record information pertaining to driver's licenses, license plates, and vehicle identification numbers. Thus, the department must withhold this information, which we have marked, under section 552.130 of the Government Code.

We note the remaining information contains insurance policy and bank account numbers. Section 552.136 of the Government Code provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Id. § 552.136. We conclude the insurance policy and bank account numbers we have marked constitute access device numbers for purposes of section 552.136. Thus, the department must withhold the marked information under section 552.136 of the Government Code.

The remaining information includes e-mail addresses subject to section 552.137 of the Government Code, which excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail addresses at issue are not specifically excluded by section 552.137(c). As such, these e-mail addresses, which we have marked, must be withheld under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b).

In summary, the department must withhold under section 552.101 of the Government Code the marked CHRI in conjunction with federal law and chapter 411 of the Government Code; the marked concealed handgun license information in conjunction with section 411.192 of the Government Code; the marked fingerprints in conjunction with section 560.003 of the Government Code; the marked psychological evaluations in conjunction with section 611.002 of the Health and Safety Code; the marked L-2 and L-3 forms in conjunction with section 1701.306 of the Occupations Code; the marked polygraph information in conjunction with section 1703.306 of the Occupations Code; and the marked personal financial information in conjunction with common-law privacy. The department must also withhold the marked dates of birth under section 552.102(a) of the Government Code; the marked home address and cellular telephone number under section 552.1175 of the

Government Code, to extent the officer elected to withhold the information and the officer paid for the cellular telephone service; the marked Texas motor vehicle record information under section 552.130 of the Government Code; the marked insurance policy and bank account numbers under section 552.136 of the Government Code; and the marked e-mail addresses under section 552.137 of the Government Code.⁴ The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 403433

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including fingerprints under section 552.101 in conjunction with section 560.003; L-2 and L-3 declarations under section 552.101 in conjunction with section 1701.306; Texas driver's license numbers, a copy of a Texas driver's license, and Texas license plate numbers under section 552.130; insurance policy and bank account numbers under section 552.136; and e-mail addresses of members of the public under section 552.137, without the necessity of requesting an attorney general decision.